

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RAFT THOMPSON,)	1:09-CV-00727 AWI SMS HC
)	
Petitioner,)	
)	ORDER TO SHOW CAUSE WHY THE
v.)	PETITION SHOULD NOT BE DISMISSED
)	FOR PETITIONER'S FAILURE TO
)	EXHAUST STATE REMEDIES
JAMES YATES,)	
)	
Respondent.)	

____ Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On April 24, 2009, Petitioner filed the instant federal petition for writ of habeas corpus in this Court. The petition challenges a prison disciplinary hearing held on November 16, 2007, in which Petitioner was found guilty of destroying state property.

DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing § 2254 Cases; Hendricks v. Vasquez, 908 F.2d 490 (9th Cir.1990). Otherwise, the Court will order Respondent to respond to the petition. Rule 5 of the Rules Governing § 2254 Cases.

1 A petitioner who is in state custody and wishes to collaterally challenge his conviction by a
2 petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The
3 exhaustion doctrine is based on comity to the state court and gives the state court the initial
4 opportunity to correct the state's alleged constitutional deprivations. Coleman v. Thompson, 501
5 U.S. 722, 731 (1991); Rose v. Lundy, 455 U.S. 509, 518 (1982); Buffalo v. Sunn, 854 F.2d 1158,
6 1163 (9th Cir. 1988).

7 A petitioner can satisfy the exhaustion requirement by providing the highest state court with a
8 full and fair opportunity to consider each claim before presenting it to the federal court. Duncan v.
9 Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971); Johnson v. Zenon, 88
10 F.3d 828, 829 (9th Cir. 1996). A federal court will find that the highest state court was given a full
11 and fair opportunity to hear a claim if the petitioner has presented the highest state court with the
12 claim's factual and legal basis. Duncan, 513 U.S. at 365 (legal basis); Kenney v. Tamayo-Reyes, 504
13 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis).

14 Additionally, the petitioner must have specifically told the state court that he was raising a
15 federal constitutional claim. Duncan, 513 U.S. at 365-66; Lyons v. Crawford, 232 F.3d 666, 669
16 (9th Cir.2000), *amended*, 247 F.3d 904 (2001); Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir.1999);
17 Keating v. Hood, 133 F.3d 1240, 1241 (9th Cir.1998). In Duncan, the United States Supreme Court
18 reiterated the rule as follows:

19 In Picard v. Connor, 404 U.S. 270, 275 . . . (1971), we said that exhaustion
20 of state remedies requires that petitioners "fairly present" federal claims to the
21 state courts in order to give the State the "opportunity to pass upon and correct
22 alleged violations of the prisoners' federal rights" (some internal quotation marks
23 omitted). If state courts are to be given the opportunity to correct alleged violations
24 of prisoners' federal rights, they must surely be alerted to the fact that the prisoners
25 are asserting claims under the United States Constitution. If a habeas petitioner
26 wishes to claim that an evidentiary ruling at a state court trial denied him the due
27 process of law guaranteed by the Fourteenth Amendment, he must say so, not only
28 in federal court, but in state court.

Duncan, 513 U.S. at 365-366. The Ninth Circuit examined the rule further, stating:

Our rule is that a state prisoner has not "fairly presented" (and thus exhausted) his federal claims in state court *unless he specifically indicated to that court that those claims were based on federal law*. See Shumway v. Payne, 223 F.3d 982, 987-88 (9th Cir. 2000). Since the Supreme Court's decision in Duncan, this court has held that the *petitioner must make the federal basis of the claim explicit either by citing federal law or the decisions of federal courts, even*

1 *if the federal basis is "self-evident,"* Gatlin v. Madding, 189 F.3d 882, 889
2 (9th Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 7 . . . (1982), or the
3 underlying claim would be decided under state law on the same considerations
4 that would control resolution of the claim on federal grounds. Hiiivala v. Wood,
5 195 F3d 1098, 1106-07 (9th Cir. 1999); Johnson v. Zenon, 88 F.3d 828, 830-31
6 (9th Cir. 1996);

7 In Johnson, we explained that the petitioner must alert the state court to
8 the fact that the relevant claim is a federal one without regard to how similar the
9 state and federal standards for reviewing the claim may be or how obvious the
10 violation of federal law is.

11 Lyons v. Crawford, 232 F.3d 666, 668-669 (9th Cir. 2000) (italics added).

12 Upon review of the instant petition for writ of habeas corpus, it appears that Petitioner has
13 not presented his claims to the California Supreme Court. If Petitioner has not sought relief for his
14 claims in the California Supreme Court, the Court cannot proceed to the merits of those claims. 28
15 U.S.C. § 2254(b)(1). It is possible, however, that Petitioner has presented his claims to the California
16 Supreme Court and simply neglected to inform this Court. Thus, Petitioner must inform the Court if
17 his claims have been presented to the California Supreme Court, and if possible, provide the Court
18 with a copy of the state habeas petition filed in the California Supreme Court, along with a copy of
19 any ruling made by the California Supreme Court.

20 **ORDER**

21 Accordingly, Petitioner is ORDERED TO SHOW CAUSE why the petition should not be
22 dismissed for Petitioner's failure to exhaust state remedies. Petitioner is ORDERED to inform the
23 Court what claims have been presented to the California Supreme Court within thirty (30) days of
24 the date of service of this order.

25 Petitioner is forewarned that failure to follow this order will result in dismissal of the petition
26 pursuant to Local Rule 11-110.

27 IT IS SO ORDERED.

28 **Dated: July 27, 2009**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE